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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0754-21**

JAMAAL MERRITT, JR.,

Plaintiff-Appellant,

v.

**OFFICER JOHN KELLY,
CAPTAIN MICHAEL
DAMMANN, BOROUGH OF
CARTERET, CARTERET
POLICE DEPARTMENT,**

Defendants-Respondents.

Argued October 11, 2023 – Decided November 2, 2023

Before Judges Natali and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7741-19.

Kevin Thomas Flood argued the cause for appellant (Law Office of Kevin T. Flood, LLC, attorneys; Lon C. Taylor, of counsel and on the briefs; Kevin Thomas Flood, on the briefs).

Roy Thomas Caplinger argued the cause for respondents (DeCotiis FitzPatrick Cole & Giblin LLP,

attorneys; Roy Thomas Caplinger and Adrien Al-Malik Moncur, on the brief).

Karen D. Thompson, Senior Staff Attorney, argued the cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (American Civil Liberties Union of New Jersey Foundation, attorneys; Karen D. Thompson, Alexander R. Shalom, and Jeanne M. LoCicero, on the brief).

PER CURIAM

Plaintiff Jamaal Merritt, Jr., appeals from two Law Division orders that dismissed his complaint in which he alleged defendants Officer John Kelly, Captain Michael Dammann, Borough of Carteret, and Carteret Police Department (CPD) (collectively, defendants) violated the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2 (NJCRA) by: 1) retaliating against him for exercising his right to freedom of speech; 2) unlawfully arresting and maliciously prosecuting him; 3) manufacturing false evidence; and 4) engaging in a civil conspiracy to deprive him of his constitutional due process rights. Plaintiff also averred Carteret and CPD acted pursuant to an unspecified policy, custom, or practice in failing to adequately train, supervise or discipline Officer Kelly and Captain Dammann, contrary to the NJCRA.

Plaintiff first challenges a January 8, 2021 order granting defendants' joint Rule 4:6-2(e) motion and dismissing, with prejudice, the six-count complaint.

He contends the court erred in relying upon the municipal court's finding of probable cause to dismiss his claims and to support Officer Kelly's qualified immunity defense, and in determining the notice requirements of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12-3 applied to all his causes of action. Plaintiff also appeals a September 29, 2021 order denying his application in which he requested the court provide additional findings of fact and conclusions of law and reconsider its January 2021 order. Separately, plaintiff challenges the court's oral ruling, not specifically memorialized in a written order, denying his recusal application.

After carefully considering the parties' contentions against the record and applicable law, we reach the following conclusions. First, we are convinced the court erred in applying collateral estoppel principles to support its probable cause finding. Second, the complaint sufficiently alleged defendants lacked probable cause to effectuate his arrest and disputed Officer Kelly's qualified immunity defense, and because the facts in the motion record on both issues were disputed, dismissal was an inappropriate remedy.

Third, because we are satisfied, as pled, plaintiff's retaliation and unlawful arrest claims are cognizable under the NJCRA, the TCA's notice requirements did not apply to those causes of action, and the court's ostensible dismissal on

that basis was accordingly improper. We reach a different result with respect to plaintiff's malicious prosecution; manufacturing false evidence; failure to train, supervise, or discipline; and civil conspiracy claims, however. While it was undisputed plaintiff failed to comply with the TCA's notice requirements and we agree with the court ordinarily such failure would bar any asserted common law torts, we believe the better course is to vacate that portion of the court's January 8, 2021 order and remand to provide plaintiff with the opportunity to amend his complaint to adequately plead the specific constitutional or statutory rights under the NJCRA.

Finally, we discern nothing that would lead us to have doubts about the trial judge's impartiality and accordingly affirm the court's decision to deny plaintiff's recusal application.

We therefore reverse the dismissal of plaintiff's claims for retaliation and unlawful arrest and remand with direction for the court to reinstate those claims. We also reverse the court's grant of qualified immunity to Officer Kelly and remand for further proceedings in accordance with this opinion. We vacate the order dismissing plaintiff's malicious prosecution; manufacturing false evidence; failure to train, supervise, or discipline; and civil conspiracy claims

with instructions that the court permit plaintiff an opportunity to amend his complaint. Finally, we affirm the denial of plaintiff's recusal application.

I.

We briefly summarize the facts in the record, considering those as pled to be "true" and affording plaintiff "all legitimate inferences." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). Plaintiff is a self-described advocate against police brutality and corruption, well-known in the community for filming police-citizen encounters. In October 2017, plaintiff filed an internal affairs complaint with the CPD and a lawsuit, not at issue in this appeal, against defendants Captain Dammann, Carteret, CPD, and other CPD officers. In that case, he alleged violations of his civil rights following an arrest where he was pepper sprayed.

One month later, on November 14, 2017, plaintiff observed an incident between Officer Kelly, other CPD officers, and Edward Burton, which he filmed with his cell phone. According to Officer Kelly's investigation report, while attempting to arrest Burton, Officer Kelly suspected Burton was trying to swallow a controlled dangerous substance. To prevent this from occurring, Officer Kelly and Officer Antonio Dominguez "escorted [Burton] to the ground" with Officer Dominguez using pepper spray on Burton's face. When Burton

began to scream, plaintiff claims he yelled for officers to call an ambulance, recalling his own prior experience being pepper sprayed by CPD. Because the police failed to seek medical assistance, plaintiff alleged he attempted to call an ambulance, but his cell phone's battery died.

The parties dispute the nature of plaintiff's next actions. Plaintiff maintains he left the porch and crossed the street, away from the officers and separated from them by a police car, to call an ambulance at a pay phone. Officer Kelly claims plaintiff approached CPD officers, "causing a scene to create more foot traffic and onlookers" and distracting the officers from their arrest of Burton.

Plaintiff averred in his complaint video captured by the body-worn and police car cameras of Officers Kelly and Dominguez demonstrates he did not approach the officers or physically interfere with the arrest in any way; however, no video was presented to the municipal or trial courts. An unknown CPD officer ultimately arrested plaintiff who, upon the certification of Officer Kelly, was charged with obstruction contrary to N.J.S.A. 2C:29-1(a).

Plaintiff's obstruction case remained pending before the municipal court for over two years before the court ultimately dismissed it on speedy trial grounds, citing the "failure of the State to prosecute the case within a timely

manner." After dismissing the matter, the court, sua sponte, and without providing any factual basis for its finding, concluded the police had probable cause to arrest plaintiff. The court did not conduct a probable cause hearing, nor was a hearing requested by either party. Plaintiff's counsel did state plaintiff "dispute[d] probable cause," but he did not request the court make further findings of fact, nor did he later appeal the court's probable cause finding after dismissal.

Plaintiff filed his complaint against defendants and additional fictitious individuals and corporations, which he amended following the dismissal of the municipal court summons. As noted, plaintiff brought six claims, each styled as a cause of action under the NJCRA. First, plaintiff alleged that defendants retaliated against him for exercising his right to free speech by arresting him for obstruction. Next, plaintiff claimed that he was unlawfully arrested in violation of the state constitution. The filing of the obstruction charge, and the related proceedings, he alleged, constituted malicious prosecution.

Additionally, he contended Officer Kelly's certification giving rise to the obstruction proceedings constituted fabricated evidence, depriving him of his liberty and due process. Plaintiff also claimed Carteret and CPD were acting pursuant to an unspecified official policy, custom, or practice in failing to

adequately train, supervise or discipline Officer Kelly and Captain Dammann. Finally, he asserted the false obstruction charge, the delay in the municipal court proceedings, and CPD's purposeful withholding of exculpatory video footage evidenced a civil conspiracy to deprive him of his due process rights.

On September 15, 2020, defendants jointly moved to dismiss the complaint for failure to state a claim under Rule 4:6-2(e). In support, they primarily relied upon the municipal court's probable cause finding, which they contended collaterally estopped plaintiff from contesting the issue and was fatal to the malicious prosecution and unlawful arrest claims. Further, defendants argued plaintiff's admission in the complaint to yelling, along with the municipal court's probable cause finding, established "per se, good faith" which entitled Officer Kelly to qualified immunity. Defendants also argued plaintiff's failure to comply with the TCA's notice requirements barred any asserted common law tort claim.

In opposing defendants' application, plaintiff argued the TCA did not apply because all of his claims were pled pursuant to the NJCRA, which does not require notice to a municipal entity. Plaintiff also contended the municipal court's probable cause determination did not support dismissal because the existence of probable cause is a typically a question of fact for the jury. Further,

plaintiff maintained defendants could not establish the required elements for collateral estoppel, specifically that the issue of probable cause was actually litigated in the municipal court proceeding. Finally, plaintiff argued it was premature to apply qualified immunity principles in light of the numerous underlying factual disputes raised in the parties' pleadings.

The court issued a written order and statement of reasons on January 28, 2021 granting defendants' motion and dismissing the complaint with prejudice. The court found plaintiff failed to satisfy the TCA's notice requirement, the court was bound by the municipal court's finding of probable cause, and Officer Kelly was entitled to qualified immunity.

As noted, plaintiff requested the court issue more detailed findings of fact and conclusions of law pursuant to Rule 1:7-4, and reconsider the dismissal pursuant to Rule 4:49-2. Plaintiff specifically asked the court to identify those specific facts from the municipal court dismissal order to which the court was bound, and further sought clarification of the court's legal conclusions supporting its decision to apply the TCA to his NJCRA claims, grant Officer Kelly qualified immunity, and find defendants satisfied the requirements for collateral estoppel.

In addition, during oral arguments, plaintiff's counsel requested the court recuse itself. Plaintiff based his request on a statement by the court after a colloquy with plaintiff's counsel in which the court stated "for appellate purposes, I'm going to blow your mind because, since I only have 311 days left [before retirement] I'm going to write more than I've ever written before just for you." The court declined to recuse itself, stating it was neither offended nor upset and, in fact, "ha[d] a smile on [its] face." The court added that it liked plaintiff's counsel, had "known [him] ever since [he] [came] into our legal universe," but had "ruled against [him], period."

The court denied plaintiff's motion for reconsideration, but nevertheless expanded upon the rationale behind its dismissal in a supplemental addendum to the order. The court relied on upon Howard Savings Institution of Newark v. Peep, 34 N.J. 494 (1961) and noted the municipal court's "finding of probable cause was crucial to [p]laintiff's pending [c]ivil case . . . and would give [p]laintiff standing as an aggrieved party and could have been appealed, despite prevailing on the speedy trial motion." In addition, the court cited Tarus v. Borough of Pine Hill, 189 N.J. 497, 521 (2007), for the proposition plaintiff was estopped from litigating the court's probable cause finding because the issue was actually determined in the municipal court.

The court also explained the municipal court's probable cause finding, in part, entitled Officer Kelly to qualified immunity and the malicious prosecution claim was brought under the common law and thus subject to the TCA's notice requirements. Because plaintiff conceded he failed to file notice as required by the TCA, the court concluded, that claim was barred. The court did not specify the bases for its dismissal of the retaliation; manufacturing false evidence; failure to train, supervise, or discipline; or civil conspiracy claims. This appeal followed.

II.

We initially detail the different standards of review that govern the multiple issues presented in this appeal. First, we review an order granting a motion to dismiss for failure to state a claim "de novo, applying the same standard under Rule 4:6-2(e) that governed the motion court." Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). That standard is whether the pleadings even "suggest[]" a basis for the requested relief. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). A reviewing court assesses only the "legal sufficiency" of the claim based on "the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown, 116 N.J. at 746).

The court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing-Mart Morristown, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Consequently, "[a]t this preliminary stage of the litigation the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation[s] contained in the complaint," ibid., rather the facts as pled are considered "true" and accorded "all legitimate inferences," Banco Popular, 184 N.J. at 166.

We review a "trial court's interpretation of the law and the legal consequences that flow from established facts" de novo, giving no special deference to the trial court's findings. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The application of collateral estoppel is a question of law, Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000), which is reviewed de novo, Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 583 (2018).

Second, we apply an abuse of discretion standard when reviewing an order denying reconsideration. Gold Tree Spa, Inc. v. PD Nail Corp., 475 N.J. Super.

240, 245 (App. Div. 2023). Generally, recusal motions are also "entrusted to the sound discretion of the judge and are subject to review for abuse of discretion." State v. McCabe, 201 N.J. 34, 45 (2010).

A trial court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Estate of Kotsovska by Kotsovska v. Liebman, 221 N.J. 568, 588 (2015) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

III.

Before us, plaintiff argues the court erred in dismissing the complaint because it based its determination on the incorrect legal conclusion he was precluded from contesting the municipal court's probable cause finding. On this point, he reprises his argument the court mistakenly ascribed preclusive effect to the municipal court's probable cause finding, contrary to In re Estate of Dawson, 136 N.J. 1, 20 (1994). He specifically asserts probable cause was not

"actually litigated in the prior proceeding," ibid., because the municipal court made its finding without notice or consideration of the parties' legal and factual arguments and preclusion was applied inequitably and unfairly. Joining plaintiff's position, amicus notes the municipal court failed to follow proper procedure or conduct the necessary analysis needed to make its probable cause finding. It further explained neither plaintiff nor the State presented argument or proof on the issue, and the court did not explain the factual or legal basis for its determination.

In response, defendants argue the court properly dismissed the complaint because probable cause defeated the unlawful arrest and malicious prosecution claims and established a basis for qualified immunity. Defendants rely on Tarus, 189 N.J. at 520-21, and multiple unpublished cases, for the proposition a probable cause finding precludes subsequent civil litigation related to an arrest.¹

Defendants contend that plaintiff had a full and fair opportunity to litigate probable cause in the municipal court matter because he could have requested a hearing on probable cause or appealed the probable cause finding. Defendants further maintain probable cause is a "threshold and essential issue in any

¹ Pursuant to Rule 1:36-3, an unpublished opinion is of no precedential value. Regardless, we have reviewed the opinions cited and find them factually distinguishable.

criminal proceeding," and as such the finding was properly made and essential to the judgment. We agree with plaintiff the court erred in dismissing the complaint because it improperly found plaintiff was collaterally estopped from litigating probable cause.

Collateral estoppel, or issue preclusion, is an equitable principle which provides "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 85 (2012) (alteration in original) (quoting Restatement (Second) of Judgments § 27 (1982)). The doctrine facilitates society's interest in "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness." Ibid. (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522 (2006)).

To determine whether collateral estoppel principles should apply to preclude relitigation of an issue, our Supreme Court has set forth a five-factor test:

[T]he party asserting the [doctrine] must show that: (1) the issue to be precluded is identical to the issue

decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[Ibid. (quoting Dawson, 136 N.J. at 20).]

Each factor must be satisfied for collateral estoppel to apply. Perez v. Rent-A-Center, Inc., 186 N.J. 188, 199 (2006). Even if all five factors are met, however, the court must not apply the doctrine if it would be unfair to do so. Ibid.; Allen v. V & A Bros., Inc., 208 N.J. 114, 138 (2011). The ultimate question is "whether a party has had his day in court on an issue." State v. K.P.S., 221 N.J. 266, 278 (2015) (quoting McAndrew v. Mularchuk, 38 N.J. 156, 161 (1962)).

As is particularly relevant here, an issue is actually litigated in a prior proceeding when it "is properly raised, by the pleadings or otherwise, . . . submitted for determination, and is determined." Allesandra v. Gross, 187 N.J. Super. 96, 105 (App. Div. 1982) (quoting Restatement (Second) of Judgments, § 27 cmt. d (1982)). Unlike claim preclusion or res judicata, "[a] judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action." Id. at 106 (emphasis added) (quoting Restatement (Second) of Judgments, § 27 cmt. e (1982)).

We disagree with defendants' claim the issue of probable cause was actually litigated in the municipal court. Although the full record of those proceedings is not before us, neither party asserts plaintiff or the State properly and specifically raised the issue or submitted it for determination by the court, nor did the court explain the factual basis for its finding.

We also disagree with defendants that plaintiff's failure to move to dismiss the municipal complaint for lack of probable cause is fatal to his claims, as collateral estoppel does not apply to matters "which might have been but were not litigated and determined in the prior action." Allesandra, 187 N.J. Super. at 106. Further, as the Restatement (Second) of Judgments recognized in comment e to section 27, "[t]here are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action." That comment is particularly appropriate here, where the court dismissed the obstruction charge before it made its sua sponte finding that probable cause existed for plaintiff's arrest. Further, we are not persuaded by defendants' argument probable cause was a threshold issue in the municipal court matter as the issue, for preclusive purposes, is whether probable cause was actually litigated. As noted, that simply did not occur.

We also find defendants' reliance on Tarus misplaced as it is factually distinguishable. In that case, the court concluded collateral estoppel principles were appropriately applied because probable cause was "thoroughly evaluated" in plaintiff's prior § 1983 action by the district court, which made specific findings supporting probable cause, and the court's decision was affirmed by the Third Circuit. 189 N.J. at 520-21. Here, the municipal court provided no basis for its finding, nor is there any indication of what evidence it reviewed and evaluated. In addition, unlike in Tarus, the probable cause issue was not raised by either party in the prior proceeding.

Further, to the extent defendants claim Tarus supports the proposition a probable cause finding in a prior criminal proceeding is per se preclusive without consideration of the equitable or remaining factors set forth in Dawson, 136 N.J. at 20, we disagree. Nothing in Tarus supports the conclusion our Supreme Court intended to overrule Dawson or its factors, particularly when it reiterated their applicability three years later, in Winters. See Tarus, 189 N.J. at 520-21; Winters, 212 N.J. at 85.

Finally, in determining whether collateral estoppel should be applied, the court must "weigh economy against fairness." Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002). The Supreme Court has identified factors

weighing in favor of the doctrine's application, including "conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency." Olivieri, 186 N.J. at 523 (quoting Pace v. Kuchinsky, 347 N.J. Super. 202, 216 (App. Div. 2002)). It also specified circumstances where preclusion is disfavored, including where

[t]he party against whom [collateral estoppel] is sought could not have obtained review of the prior judgment; the quality or extent of the procedures in the two actions is different; it was not foreseeable at the time of the prior action that the issue would arise in subsequent litigation; and the precluded party did not have an adequate opportunity to obtain a full and fair adjudication in the prior action.

[Ibid. (quoting Pace, 347 N.J. at 216).]

The Restatement (Second) of Judgments § 29 provides further considerations, Allen, 208 N.J. at 138, such as whether "[t]reating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto [or] . . . [o]ther compelling circumstances make it appropriate that the party be permitted to relitigate the issue." Restatement (Second) of Judgments, § 29. Ultimately, the court should subordinate efficiency to fairness and should not apply collateral estoppel when it would lead to an unjust result. Hennessey v. Winslow Twp., 368 N.J. Super. 443, 452-53 (App. Div. 2004).

We are satisfied it would be unfair and inequitable to apply collateral estoppel principles under the facts presented. As noted, the municipal court did not make any factual findings in support of its determination and, as amicus highlighted, the municipal court made its finding only after dismissing the summons. Further, the municipal court gave the parties no advance notice of its intent to address probable cause, nor did it identify the issue as disputed. As such, plaintiff had no opportunity to present evidence or make argument on the matter before the court ruled. In light of the harsh consequences for plaintiff's civil claims and the context in which the court made its probable cause finding, we are satisfied it would be inequitable to collaterally estop plaintiff from litigating probable cause under these circumstances. As all factors must be satisfied for the doctrine to apply, see Rent-A-Center, 186 N.J. at 199, we find it unnecessary to address the remaining factors.

IV.

Plaintiff also contends the court erroneously dismissed his complaint at the pleading stage, and without discovery, because the existence of probable cause was a factual question which should be determined by a jury. We agree.

The absence of probable cause is an essential element of malicious prosecution and unlawful arrest claims. See LoBiondo v. Schwartz, 199 N.J.

62, 90 (2009) ("Malicious prosecution requires the plaintiff to prove four elements: (1) a criminal action was instituted by this defendant against this plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff.") (emphasis added); Mesgleski v. Oraboni, 330 N.J. 10, 24 (2000) ("[Unlawful arrest] requires an arrest or detention of the person against his or her will; and lack of proper legal authority or 'legal justification.' . . . The existence of probable cause is a defense to false arrest if it serves to validate the arrest."). The existence of probable cause is an absolute defense, therefore, to both unlawful arrest and malicious prosecution. Tarus, 189 N.J. at 521.

"Probable cause exists if at the time of the arrest 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000) (alterations in original) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)). In determining whether probable cause exists, the court views the totality of the circumstances from the standpoint of an objectively reasonable officer. State v. Gibson, 218 N.J. 277, 293 (2014).

Under New Jersey law, "the existence of probable cause is ordinarily a question of law, nevertheless, it becomes a mixed question of law and fact when the underlying facts . . . are in dispute." Jobes v. Evangelista, 369 N.J. Super. 384, 398 (App. Div. 2004). Even where a grand jury previously indicted the plaintiff, a jury must resolve probable cause in a subsequent civil rights case when facts are disputed. Helmy v. City of Jersey City, 178 N.J. 183, 191 (2003).

Having found the trial court is not bound by the municipal court's finding of probable cause, we also reject defendants' argument that finding demonstrates an absence of disputed material facts on the issue. Here, there are clear disputes of material fact presented by plaintiff in his complaint.² Primarily, plaintiff claims that he crossed the street away from the officers arresting Burton, was separated from the officers by a police vehicle, and "never even came close to Officer Dominquez [sic] or [d]efendant Officer Kelly while they [we]re tending [. . .] to Burton." On the other hand, the municipal court complaint and summons authored by Officer Kelly, on which defendants rely, states plaintiff

² The court found plaintiff, in his complaint, "admit[ted] to the facts that were alleged in the [m]unicipal [c]ourt complaint." While plaintiff does admit to yelling, a fair reading of the complaint, in toto, does not reveal in our view an admission to other facts alleged in the municipal complaint, such as his approaching Officers Kelly and Dominguez or any intent to obstruct or impair their arrest of Burton.

"approach[ed] officers" and thus created a "physical interference or obstacle" to their arrest of Burton. Whether plaintiff affirmatively interfered with the arrest is critical to the finding of probable cause to arrest plaintiff for obstruction contrary to N.J.S.A. 2C:29-1. With this crucial underlying fact in dispute, probable cause becomes an issue that must be determined by a jury. In addition, defendants' arguments fail to recognize the low threshold of Rule 4:6-2 motions, which requires us to accord plaintiff all legitimate inferences and take the allegations made in his complaint as true. Banco Popular, 184 N.J. at 166. Under this standard, we conclude plaintiff has adequately pled an absence of probable cause for his arrest and prosecution to survive a motion to dismiss.

V.

Further, plaintiff claims, with the support of amicus, the court also erred in dismissing his complaint based on its grant of qualified immunity to Officer Kelly. Again, we agree.

To determine if qualified immunity applies, the court considers whether: (1) "the evidence, viewed in the light most favorable to the plaintiff, establishes that the [defendant] violated the plaintiff's constitutional or statutory rights" and (2) "the right allegedly violated was "clearly established" at the time of the [defendant]'s actions." Baskin v. Martinez, 243 N.J. 112, 128 (2020). The

defendant claiming qualified immunity bears the burden of its proof by a preponderance of the evidence. Schneider v. Simonini, 163 N.J. 336, 359 (2000). An official can claim qualified immunity to claims related to arrest or prosecution "by demonstrating either that he or she acted with probable cause, or that a reasonable law enforcement officer could have believed there was probable cause." Mesgleski, 330 N.J. at 26.

In Brown v. State, the Court explained qualified immunity as follows:

The affirmative defense of qualified immunity protects government officials from personal liability for discretionary actions taken in the course of their public responsibilities, 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' The defense 'extends to suits brought under . . . the [NJ CRA].'

This state's qualified immunity doctrine tracks the federal standard, shielding from liability all public officials except those who are 'plainly incompetent or those who knowingly violate the law.'

[230 N.J. 84, 97-98 (2017) (ellipses in original) (citations omitted).]

Ordinarily, application of the qualified immunity defense is a legal question for the court rather than the jury; therefore, the defense should be raised and resolved "long before trial." Schneider, 163 N.J. at 356 (quoting Hunter v. Bryant, 502 U.S. 224, 228 (1991)). Qualified immunity relieves an eligible

defendant from the burden of trial. See, e.g., Pearson v. Callahan, 555 U.S. 223, 232 (2009) (noting "the importance of resolving immunity questions at the earliest stage in litigation" (quoting Hunter, 502 U.S. at 227)).

An exception to that rule arises when the case involves disputed issues of fact. Schneider, 163 N.J. at 359. In such a circumstance, the case should be submitted to the jury to determine "the who-what-when-where-why type of historical fact issues," after which the trial judge incorporates those findings in determining whether qualified immunity applies. Ibid. (quoting Cottrell v. Caldwell, 85 F.3d 1480, 1488 (11th Cir. 1996)).

Here, the trial court's qualified immunity ruling was based upon the municipal court's finding of probable cause and its erroneous conclusion plaintiff was collaterally estopped from contesting that finding. Removing the municipal court's finding from the equation, we are satisfied the pleadings adequately allege a dispute whether a reasonable officer in Officer Kelly's situation would believe that probable cause existed.

VI.

Next, plaintiff argues the court improperly dismissed his complaint based on his failure to file notice of claim within ninety days of accrual of his causes

of action against a public entity or employee, as required by the TCA.³ In support, he relies on Owens v. Feigin, 194 N.J. 607, 609 (2008), for the proposition that the TCA's notice requirement does not apply to claims, like his, brought under the NJCRA. As noted, we agree in part with plaintiff's arguments.

Pursuant to the TCA, a plaintiff instituting a tort action against a public entity must file a pre-suit notification of the claim in writing within ninety days of the accrual of the action or else be forever barred from asserting that cause of action. Guzman v. City of Perth Amboy, 214 N.J. Super. 167, 171 (App. Div. 1986). The TCA defines "public entity" as including "any . . . municipality, . . . public agency, and any other political subdivision or public body in the State." N.J.S.A. 59:1-3. Public employees—"officer[s], employee[s], or servant[s]" of a public entity "authorized to perform any act or service"—are also protected under the TCA. Ibid. Here, it is undisputed that defendants Carteret and CPD are public entities and defendants Officer Kelly and Captain Dammann are public employees.

"The rationale underlying the notice requirement of the [TCA] is to expedite investigation with the hope of reaching a nonjudicial settlement and to allow the public entity prompt access to information about the claim so that it

³ See N.J.S.A. 59:8-8.

may prepare a defense." Wood v. Cnty. of Burlington, 302 N.J. Super. 371, 375 (App. Div. 1997) (quoting Pilonero v. Twp. of Old Bridge, 236 N.J. Super. 529, 533 (App. Div. 1989)). Our Supreme Court has held, however, that the TCA notice requirement does not apply to causes of action under the NJCRA, as "the CRA's purpose includes rectifying violations of constitutional rights, the protection of which has never depended on the satisfaction of the TCA's procedural and substantive requirements." Owens, 194 N.J. at 613-14.

The question before us is whether plaintiff's claims are cognizable under the NJCRA. On that point, we note the NJCRA creates a private cause of action against public defendants for their deprivation of or interference with substantive rights secured by the New Jersey Constitution, United States Constitution, or state law, N.J.S.A. 10:6-2(c), and we look to the body of law on § 1983 claims to guide our analysis. See Perez v. Zagami, LLC, 218 N.J. 202, 215 (2014) (finding that NJCRA is intended as a state analogue to § 1983 and should be constructed in keeping with that purpose). We note, however, "[§] 1983 provides remedies for the deprivation of both procedural and substantive rights while [the NJCRA] provides remedies only for the violation of substantive rights." Tumpson v. Farina, 218 N.J. 450, 477 (2014).

In analyzing the required level of specificity for a NJCRA claim, we are informed by its federal counterpart. A § 1983 complaint is not subject to a heightened pleading requirement beyond the notice pleading standard of Fed. R. Civ. P. 8(a). Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit, 507 U.S. 163, 168 (1993). The New Jersey analogue, Rule 4:5-2, requires a complaint to "contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief." Vague, conclusory allegations are insufficient. Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986). Further, the complaint "must state the essential elements of a cause of action simply, concisely, and directly." Ibid. (citing Grobart v. Soc'y for Est. Useful Mfrs., 2 N.J. 136, 152 (1949)).

To prevail on a NJCRA claim, a plaintiff must establish that "(1) 'the Constitution or laws of this State' [or the United States] conferred on them a substantive right; (2) the [defendant] deprived them of that right; and (3) the [defendant] was 'acting under color of law' when he did so." Tumpson, 218 N.J. at 473 (quoting N.J.S.A. 10:6-2(c)). First, to determine whether "'the Constitution or laws of this State' [or the United States] conferred on [plaintiff] a substantive right," ibid. (quoting N.J.S.A. 10:6-2(c)), we must identify which specific right is claimed. See Manuel v. City of Joliet, 580 U.S. 357, 370 (2017)

(holding the court must "identify the specific constitutional right at issue" as a threshold inquiry under § 1983).

Next, we must examine whether plaintiff sufficiently alleged defendants deprived him of the identified substantive right. Tumpson, 218 N.J. at 473. Our Supreme Court interpreted deprivation as the term is commonly understood: "[a]n act of taking away' and '[a] withholding of something' . . . and '[t]o keep from having or enjoying.'" Id. at 481 (all alterations but ellipses in original) (quoting Black's Law Dictionary 507 (9th ed. 2009) and Webster's II New College Dictionary 305 (2001)). Finally, we note defendants have not disputed that they were acting in their "official capacit[ies] and therefore under color of law," id. at 473, at the time of the actions underlying plaintiff's complaint.

Although the court did not explicitly state the basis for its dismissal of all but the malicious prosecution claim, our review, as noted, is de novo. Accordingly, we address each of plaintiff's claims.

We are satisfied from our review of the complaint that plaintiff's retaliation and unlawful arrest claims adequately state a claim under the NJCRA. The retaliation claim identifies plaintiff's "civil right to speak freely without retaliation [under] Article I of the New Jersey . . . Constitution," which he avers defendants deprived him of by charging him with obstruction in retaliation for

filing his complaint with CPD and his initial lawsuit. The unlawful arrest claim specifies the "right to be secure in his person against unreasonable seizures and/or arrests of his person, in violation in various rights and privileges set forth in the New Jersey . . . Constitution." Plaintiff alleges defendants deprived him of this right by arresting him without probable cause. Although perhaps inartfully pled, these allegations are sufficient to put defendants on notice of the nature of plaintiff's claims and for the court to determine whether the New Jersey Constitution actually confers the substantive right alleged and whether defendants deprived plaintiff of that right.

However, even "search[ing] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim," Printing Mart-Morristown, 116 N.J. at 746, as is required in reviewing a motion to dismiss under Rule 4:6-2(e), we are unable to discern whether the remaining four counts properly state a claim for relief under the NJCRA. The manufacturing false evidence and civil conspiracy claims each identify a right to due process under the state constitution.⁴ It is

⁴ The manufacturing false evidence claim alleges "a deprivation of liberty that violates due process of law in violation of various rights and privileges set forth in the New Jersey . . . Constitution," while the civil conspiracy claim identifies a "due process right to be heard in an impartial forum and/or the right of access

unclear, however, whether plaintiff alleges substantive or procedural due process, a significant distinction for a NJCRA claim. See Tumpson, 218 N.J. at 477-78.

Although plaintiff notes before us a malicious prosecution claim under the NJCRA requires he demonstrate "a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding," the complaint is unclear as to which specific constitutional or statutory rights plaintiff alleges defendants violated. Rather, plaintiff simply states that he "has and will continue [to] suffer damages for being deprived of his constitutional rights as set forth above." Plaintiff's failure to train, supervise, or discipline claim is similarly deficient, alleging only that he was "deprived . . . of various rights and privileges set forth in the New Jersey . . . Constitution." While this identifies the state constitution, it again is unclear, unlike plaintiff's retaliation and unlawful arrest claims, which clearly identify the rights to free speech and to be free from unreasonable seizures, respectively.

Rather than dismiss plaintiff's claims, however, we believe the better course was to permit plaintiff to replead, as it is well settled when considering a

and/or seek redress from the courts" which is "guaranteed by the Constitution of . . . New Jersey."

Rule 4:6-2(e) motion to dismiss, "opportunity [should be] given to amend if necessary." Printing Mart-Morristown, 116 N.J. at 746 (quoting Di Cristofaro, 43 N.J. Super. at 252). "[A] complaint should not be dismissed pursuant to Rule 4:6-2(e) so long as a cause of action is suggested by the facts." Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 349 (App. Div. 2006). "[P]laintiffs generally should be permitted to file an amended complaint to cure the defects in their pleading" before a Rule 4:6-2(e) dismissal. Nostrame v. Santiago, 213 N.J. 109, 128 (2013). Here, we conclude the court erred by dismissing plaintiff's claims with prejudice and giving no opportunity to amend to identify the specific constitutional right at issue.

Finally, we reject defendants' contention it is "well-settled" that the TCA applies to civil conspiracy claims even under the NJCRA because application of the TCA does not hinder the underlying constitutional claim. Defendants identify only a Third Circuit case supporting their position, County Concrete Corp. v. Township of Roxbury, 442 F.3d 159, 174–75 (3d Cir. 2006). We find that reliance misplaced. County Concrete held a state law civil conspiracy claim is not converted into a state constitutional tort "merely because it is predicated upon violations of the federal and state constitutions." Ibid. The Third Circuit reasoned, first, the TCA does not apply to constitutional claims only because a

state statute cannot abrogate an individual's constitutional rights, and next, application of the TCA to a conspiracy claim limits only that state tort claim but not the underlying constitutional claim. Ibid. Therefore, the court concluded, the TCA and its notice requirement do apply to a conspiracy claim. Ibid. Defendants' argument fails when placed in the greater context of applicable case law.

First, County Concrete relies primarily upon Greenway Development Co. v. Borough of Paramus, 163 N.J. 546, 557-58 (2000), a case decided before the NJCRA was even enacted in 2004. Id. at 174; N.J.S.A. 10:6-2 (eff. Sept. 10, 2004). Additionally, County Concrete itself was decided in 2006, two years before Owens, in which the Supreme Court specifically declared that the TCA's notice requirement does not apply to claims brought under the NJCRA. Owens, 194 N.J. at 613-14. The Court in Owens highlighted a "stark field of case law universally rejecting the importation of the TCA's notice-of-claim requirement into other statutory claims, or for any constitutional claim" (emphasis added) in noting that the legislative intent demonstrated a purposeful choice not "to condition the rectifying of an infringement on an individual's vital constitutional rights . . . on satisfaction of the TCA's notice-of-claim requirement." Ibid.

Accordingly, we find the TCA does not apply to a properly pled civil conspiracy claim brought under the NJCRA.

VII.

Finally, plaintiff asserts the court erred in refusing to recuse itself, citing what he characterizes as a contentious exchange between plaintiff's counsel and the trial court during the August 26, 2021 proceeding. Specifically, he maintains the trial court demonstrated the appearance of bias against him by responding to plaintiff's motion for further findings of fact and conclusions of law with "alarming personal anger." Further, the court's failure to make findings of fact and conclusions of law as to collateral estoppel even after the motion "reveals a patent bias against counsel and his client," according to plaintiff. We disagree.

As an initial matter, we acknowledge that the court's decision was not contained in a written order, and "appeals are taken from orders . . . not from opinions [or] oral decisions." Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001)). Nevertheless, we interpret the court's order denying plaintiff's reconsideration application as memorializing its oral ruling declining to recuse itself.

Judges must act in a way "that promotes public confidence in the independence, integrity and impartiality of the judiciary, and . . . avoid[s]

impropriety and the appearance of impropriety." Code of Jud. Conduct R. 2.1; see also In re Reddin, 221 N.J. 221, 227 (2015). To determine if an appearance of impropriety exists, the court looks to whether "a reasonable, fully informed person [would] have doubts about the judge's impartiality." DeNike v. Cupo, 196 N.J. 502, 517 (2008); see also Code of Jud. Conduct R. 2.1 cmt. 3. Judges must recuse themselves from "proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned." Code of Jud. Conduct R. 3.17(B). Recusal is also required "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(g).

Withdrawing from a case "upon a mere suggestion" of disqualification is improper. Panitch v. Panitch, 339 N.J. Super. 63, 66-67 (App. Div. 2001). A judge should not step aside from a case "unless the alleged cause of recusal is known by [them] to exist or is shown to be true in fact." Hundred E. Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350, 358 (App. Div. 1986); see also Laird v. Tatum, 409 U.S. 824, 837 (1972) (holding the court's "duty to sit where not disqualified . . . is equally as strong as the duty to not sit where disqualified"). Although proof of actual prejudice is not necessary, "before the court may be disqualified on the ground of an appearance of bias, the belief that

the proceedings were unfair must be objectively reasonable." Panitch, 339 N.J. Super. at 67 (quoting State v. Marshall, 148 N.J. 89, 279 (1997)).

To hold otherwise would create an incentive for disgruntled litigants to claim bias in order to remove a judge from a case who has ruled against them. That a judge rendered decisions in a case that did not favor the party seeking recusal—even a decision reversed on appeal—is insufficient grounds for recusal. Marshall, 148 N.J. at 276; Hundred E. Credit Corp., 212 N.J. Super. at 358.

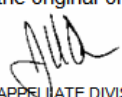
We discern nothing that would lead us to doubt the trial court's impartiality requiring recusal. After plaintiff raised concerns about the court's comments, the court clearly stated it was neither offended nor upset with counsel, and had no animosity toward him. Simply put, the court's comments do not lead to an "objectively reasonable belief" that the proceedings were unfair. Perhaps inartfully phrased, the court stated it intended to do exactly what plaintiff had requested in his motion. The court's ultimate decision to resolve the applications in defendants' favor is not sufficient to demonstrate a bias against plaintiff or his counsel.

To the extent we have not addressed any arguments raised by either party, after considering these arguments against the record and applicable law, we

conclude they lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E).

In sum, the dismissal of plaintiff's claims for retaliation and unlawful arrest is reversed and the matter is remanded with direction for the court to reinstate those claims. Similarly, the court's decision that Officer Kelly is entitled to qualified immunity is also reversed. The order dismissing plaintiff's malicious prosecution; manufacturing false evidence; failure to train, supervise, or discipline; and civil conspiracy claims with prejudice is vacated with instructions that the court permit plaintiff an opportunity to amend his complaint. Finally, we affirm the court's decision to deny plaintiff's recusal application. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION